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court to sustain its opinion was *Oelrichs v. Spain*, 15 Wall. 450, which is cited in the opinion in the principal case. If counsel fees could not be recovered as damages in an action of trespass on the case against the plaintiff in the injunction suit, it seems to us to follow as a natural, if not a necessary, consequence they could not be recovered in an action on an injunction bond with condition to pay "all such damages as may be incurred, in case the injunction shall be dissolved." In *Burruss v. Hines* the plaintiff had the right to recover, and did recover, "all damages incurred," but the court held that counsel fees in the injunction suit were not "damages incurred." Why, then, did not that case have a controlling effect in the principal case? It is hardly possible that so recent a case as *Burruss v. Hines* could have escaped the attention of the astute counsel in the principal case or of the court, and yet it was not deemed of sufficient importance to be noticed by either.

M. P. BURKS.

PHILLIPS V. THE RECTOR AND VISITORS OF THE UNIVERSITY OF
VIRGINIA AND OTHERS.*

Supreme Court of Appeals: At Staunton.

September 27, 1899.

Absent, *Keith, P.*

1. MECHANIC'S LIENS—*Public property.* Public property used for public purposes is not liable to sale for the payment of debts, and hence a mechanic's lien cannot be asserted upon it unless expressly authorized by law.
2. MECHANIC'S LIENS—*Public property—University of Virginia.* The University of Virginia is controlled through a public corporation created for the purpose, is a public institution, governed and controlled by the State, and its grounds and buildings are the property of the State, used for public purposes, and no mechanic's lien can be claimed upon them.
3. MECHANIC'S LIENS—*University of Virginia—Special act providing for deed of trust.* The fact that "The Rector and Visitors of the University of Virginia" were given authority to borrow money and issue bonds therefor to be secured by a deed of trust on the property of the University to enable them to erect other buildings in the place of those destroyed by fire constitutes no authority to the contractor, sub-contractor, or other person, who did the work or furnished the materials therefor, to assert a mechanic's lien upon the buildings erected with the money so borrowed. The act authorizing the deed of trust was intended solely for the benefit of the lender of the money. No other lien was provided for.

Appeal from a decree of the Circuit Court of Albemarle county pronounced May 20, 1899, in a suit in chancery wherein the appellant was the complainant, and the appellees were the defendants.

Affirmed.

* Reported by M. P. Burks, State Reporter.

George Perkins and Jo. Lane Stern, for the appellant.

John B. Moon and Duke & Duke, for the appellees.

RIELY, J., delivered the opinion of the court.

This suit was instituted to enforce a mechanic's lien asserted on buildings of the University of Virginia.

It is a well settled rule that public property used for public purposes is not liable to sale for the payment of debts. To allow it to be done would thereby annihilate the public uses. For this reason, public policy forbids a lien on public property. A lien upon property implies the right to sell it for the payment of the lien, but public property not being liable to be sold for the payment of debts, a mechanic's lien cannot be asserted upon it, unless expressly authorized by law. This is the general current of decisions. *Phillips on Mechanic's Liens*, sec. 179; 2 *Dillon on Mun. Corp.*, sec. 577; *Lessaid v. Town Revere* (Mass.), 50 N. E. R. 533; *Hovey v. Town of East Providence* (R. I.), 20 Atl. R. 205; *Thomas v. Illinois Ind. University*, 71 Ill. 312; *Patterson & Co. v. Penn. Ref. School*, 92 Pa. St. 229; and *First Natl. Bank of Idaho v. Malheur County*, 35 L. R. A. 141 and note.

In *Boisot on Mechanic's Liens*, sec. 308, the law on this subject is thus stated:

"There can be no mechanic's lien on public property, unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement, public property not being subject to forced sale. For this reason there can be no mechanic's lien on a courthouse, nor on county buildings generally. . . . Public school buildings are also exempt from mechanic's liens. And there can be no mechanic's lien on such public institutions as the Illinois Industrial University, the Nebraska State Lunatic Asylum, the Pennsylvania Reform School, and Girard College."

And in 2 *Jones on Liens*, sec. 1375, the law is similarly stated. "On grounds of public policy, the mechanic's lien laws," it is there said, "do not, in the absence of express provisions, apply to public buildings erected by States, counties and towns for public uses. School houses erected for the use of public schools come within this exemption. . . . Such buildings are exempt from attachment and from sale upon execution, and for the same reason are exempt from liens which might result in an adverse sale."

In *Manly Man. Co. v. Broadbuss*, 94 Va. 547, Keith, President, speaking for the court, said: "The Board of Supervisors cannot give a lien upon a public building, nor does the contractor, nor do those

who furnish materials, nor the artisans employed in its construction, acquire a lien of any kind upon it."

And in *Hicks v. Roanoke Brick Co.*, 94 Va. 747, it was said: "It is contrary to public policy to allow a lien to be acquired on public property, and the mechanic's lien laws do not apply to public buildings erected by States, cities, and counties for public uses, unless the statute creating the lien expressly so provides."

The mechanic's lien laws of this State do not, in terms, embrace public buildings or structures, and, therefore, under the law, as generally expounded, a mechanic's lien cannot be acquired on buildings erected by the State, its counties, or cities, for public uses. The inquiry then is as to the nature of the University of Virginia. Is it a public or private institution, and are its grounds and buildings public or private property?

The University of Virginia was established by the General Assembly, and the land upon which its buildings stand was acquired by the State through the conveyance from the Central College in Albemarle county to the President and Directors of the Literary Fund. The money to defray the expenses of procuring the land, erecting the buildings, and permanently endowing the University was appropriated by the General Assembly. Large appropriations out of the public treasury have been and still continue to be annually made for its support by the General Assembly. And all white students of the State of Virginia, over the age of sixteen years, are entitled to receive instruction in the academic department of the University without charge of tuition. 1 Rev. Code, p. 90, ch. 34; p. 89, ch. 33, sec. 20; Supplement to Rev. Code, p. 44, ch. 29, ch. 30; p. 46, ch. 32; p. 46, ch. 33; p. 47, ch. 34; and Code of 1887, ch. 68.

The University, from its foundation, has been wholly governed, managed, and controlled by the State through a corporation created for the purpose, under the style and title of "The Rector and Visitors of the University of Virginia," which is a public corporation, without capital or stockholders, and private individuals have no interest in or control over it. The Visitors composing the corporation were originally appointed by the Governor, with the advice of the Council, and are still periodically appointed by him, by and with the consent of the Senate. The Rector is chosen by the Visitors from their own body. The Rector and Visitors were originally required to make a report annually to the President and Directors of the Literary Fund, to be laid before the General Assembly, embracing a full account of the dis-

bursements, the funds on hand, and a general statement of the condition of the University. This report is still required to be made, but now directly to the General Assembly. 1 Rev. Code, p. 90, ch. 34; and Code of 1887, ch. 68.

From the time the University was established down to the present, the law has expressly provided that the Rector and Visitors should be at all times subject to the control of the General Assembly, and should conform to such laws as it might, from time to time, enact for their government. And they are expressly prohibited from contracting any debt whatever on account of the University without the consent of the General Assembly previously obtained. 1 Rev. Code, ch. 34, sec. 9; and Code of 1887, sec. 1554.

It is plain that the University of Virginia is in the strictest sense a public institution, and that its grounds and buildings are public property, the property of the State; that it is governed and controlled solely by the State; that its grounds and buildings are wholly dedicated to public uses; and that the interest of the public constitutes its ends and aims.

The fact that the Rector and Visitors of the University of Virginia were given authority by the act of January 23, 1896, to borrow money and issue bonds therefor, to be secured by a deed of trust on the property of the University, to enable them to erect other buildings in the place of those destroyed by fire, and that the mechanic's lien was asserted by the appellant on the buildings so erected, does not alter the case. The principle is the same. The buildings were erected on the grounds of the University, the property of the State, and were erected for public purposes, and are so used. The General Assembly, by the very act that gave the Rector and Visitors the authority to borrow money with which to restore the buildings, in addition to the regular annual appropriation, made an additional annual appropriation for the sole purpose, and no other, of paying the interest on the bonds as it should accrue, and of providing a sinking fund for the redemption of the principal. The authority to the Rector and Visitors to secure the loan by a deed of trust on the property held by the University constituted no authority to the contractor, sub-contractor, or other person, who did the work of furnishing materials therefor, to assert a mechanic's lien upon the buildings erected with the money so borrowed. No provision was made for any lien other than the deed of trust, which was wholly intended as security for the lender of the money, and not di-

rectly or indirectly for the benefit of any one who might do the work or furnish materials for it.

The Circuit Court did not err in sustaining the demurrer of the appellee and dismissing the bill. Its decree is affirmed. *Affirmed.*

NOTE.—We commented upon this decision in our last number, and cordially approved it. It ignores the case of *McClannahan v. Western Lunatic Asylum*, 88 Va. 466, and virtually overrules the principle upon which that case was decided. It was there held that a debt due the Western Lunatic Asylum—a public corporation, under the exclusive control and ownership of the State, for purely governmental purposes—was subject to the statute of limitations, just as if the corporation were private. The rationale of the decision is thus stated by Fauntleroy, J. : “The Western Lunatic Asylum is a corporation—an organized, legal entity—a personality in law, with power to sue and be sued, to plead and be impleaded; and being endowed with this capacity, it is thereby entitled to and amenable to all legal defences which pertain to private persons”—citing *Bank of U. S. v. Planters Bank*, 9 Wheat. 904; *Osborn v. Bank of U. S.* 9 Wheat. 738; *McCulloch v. Maryland*, 4 Wheat. 314; and *Western Lunatic Asylum v. Miller*, 29 W. Va. 326 (1 S. E. 740). None of these cases is in point, save the last, and that has within the past few months been repudiated by the court which decided it. The first two were cases of a private commercial corporation, in which the government was merely one of many stockholders; the third involved the power of Congress to create corporations, and the right of a State to tax corporations so created, and the decision was against the right; nothing in the case touches the principle involved in the opinion which cites it.

In West Virginia, by a long line of decisions, beginning with *Wheeling v. Campbell*, 12 W. Va. 36—which involved the adverse possession of a public street—the principle was established that public corporations do not enjoy the privileges of the maxim *nullum tempus occurrit regi*. In so holding in *Western Lunatic Asylum v. Miller* (*supra*), the West Virginia court simply followed former precedents in that State, distinctly basing its decision on *Wheeling v. Campbell*. But in *Ralston v. Weston*, 33 S. E. 236 (1899)—noticed in our September number, p. 320—the West Virginia court, perceiving its error, proceeded boldly to overturn the whole line of previous decisions in that State, and to adopt the true principle, that a purely public corporation is but an arm and agent of the government, and entitled to all the exemptions of sovereignty, save in those respects in which the legislature has otherwise provided.

The Virginia court, in the *McClannahan* case, made a singular slip in following the West Virginia case, in apparent unconsciousness that the doctrine of *Wheeling v. Campbell* had never existed in Virginia, but that, on the contrary, authority was abundant in this State directly opposing the doctrine of that case, viz., that municipal corporations are regarded as governmental agencies in the matter of adverse possession of streets, and entitled to the same exemption as the State itself, under the maxim *nullum tempus occurrit regi*. *Taylor's Case*, 29 Gratt. 780; *Yates v. Warrenton*, 84 Va. 337—since followed in *Buntin v. Danville*, 93 Va. 200; similar principles were recognized in the case of *Sayre v. Northwestern Turnpike Road*, 11 Leigh, 454, where it was held that the defendant corporation was a purely govern-

ment agency, and not subject to any suit at all, in the absence of legislative assent; and in *Long v. City of Richmond*, 17 Gratt. 375, that a municipal corporation, exercising the governmental function of maintaining a small-pox hospital, enjoyed the same exemption as the State itself from an action for negligence. In short, the Virginia court, in the *McClannahan* case, went off after strange and false West Virginia gods, oblivious of its own genuine domestic deities. The case cannot be upheld on principle, and we regret that the court in the principal case did not say so in terms.

AYERS V. HITE AND OTHERS.*

Supreme Court of Appeals: At Staunton.

September 27, 1899.

1. PRINCIPAL AND SURETY—*Extent of liability of surety.* A surety stands upon the letter of his contract, and his liability is not to be extended by implication beyond its terms. He is bound to the extent, in the manner and under the circumstances pointed out in his contract, and no further. His contracts are closely scanned by the courts and strictly construed in his favor, and any variation of the terms of the contract, even though in his favor, if made without his assent, is fatal.
2. RECEIVERS AND COMMISSIONERS—*Direction to collect a particular fund—Liability of surety for other funds.* If a receiver or commissioner is directed to collect and disburse a particular debt upon executing a bond, with surety, conditioned for the faithful discharge of his duty as such receiver or commissioner under that or any future order of the court in that cause, the surety in such bond, when given, is not liable for defaults of the principal in the collection and disbursement of other funds collected under subsequent orders in the cause. The future orders mentioned in the decree of appointment refer to orders relating to the particular debt directed to be collected by that decree.
3. SURETIES—*Public officers—Special commissioner or receiver—Funds collected by principal by color of his office.* The doctrine that a surety of a public officer is bound for funds collected by his principal by color of his office has no application to the surety on the bond of a commissioner or receiver of a court appointed to collect and disburse a particular fund, and the condition of whose bond is for the faithful discharge of that duty.

Appeal from a decree of the Circuit Court of Augusta county, pronounced June 3, 1898, in the chancery suit of *Hite v. Hite*.

Reversed.

The opinion states the case.

Patrick & Gordon and Turner K. Hackman, for the appellant.

Charles Curry and Hurst Glenn, for the appellees.

* Reported by M. P. Burks, State Reporter.